commission if the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the application process. The appeal shall be limited to questions of law. (Amended, effective May 4, 1990 and January 2, 1996.)

(B) Motion for interlocutory appeal regarding party status. Upon motion of any party, or person denied party status, the board in its sole discretion may review an appeal from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling grants or denies party status and the board determines that such review may materially advance the application process. (Added, effective January 2, 1996.)

(C) Filing of appeal and response. Any motion for interlocutory appeal under this rule must be made to the board within 10 days after entry of the order or ruling appealed from and shall include a copy of that order or ruling. The motion must be accompanied by the filing fee specified in Rule 11(C) of these rules. An original and ten copies of the motion, supporting memorandum, and order or ruling shall be filed with the board and a copy of the motion shall be sent by U.S. mail to all parties and to the district commission. Within five days of such service, an adverse party may file an original and ten copies of a memorandum in reply to the motion with the board. A copy of a memorandum in reply shall be sent to all parties and to the district commission. (Added, effective January 2, 1996.)

(D) Proceedings on appeal. Any interlocutory appeal shall be

determined upon the motion and any response without hearing unless the board otherwise orders. If a motion for interlocutory appeal is granted under section (A) of this rule, board proceedings shall be confined to those issues identified in the order permitting the appeal. If a motion for interlocutory appeal is granted under section (B) of this rule, board proceedings shall be confined to the specific grant(s) or denial(s) of party status identified in the motion. For any interlocutory appeal, the board may convene such hearings to hear oral argument as it deems necessary to dispose of the appeal. Such proceedings shall be conducted as provided by these rules for appeals to the board. (Amended, effective January 2, 1996.)

(E) Stay of district commission proceedings. On receipt of a motion filed under this rule the chair of the board may issue an order staying district commission proceedings until disposition of the motion by the board. (Added, effective January 2, 1996.)

ARTICLE V. SUBSTANTIVE REVIEW - SPECIAL PROCEDURES

Rule 51. Minor Application Procedures

(A) Qualified projects. Any development or subdivision subject to the permit requirements of 10 V.S.A. § 6081 and these Rules may be reviewed in accordance with this Rule as a "Minor Application" if the district commission finds that there is demonstrable likelihood that the project will not present significant adverse impact under any of the 10 criteria

of 10 V.S.A. § 6086(a). In making this finding, the district commission may consider:

(1) the extent to which potential parties and the district commission have identified issues cognizable under the 10 Criteria;

(2) whether or not other State permits identified in Rule 19 are required and, if so, whether those permits have been obtained or will be obtained in a reasonable period of time;

(3) the extent to which the project has been reviewed by a municipality pursuant to a by-law authorized by 24 V.S.A. Chapter 117;

(4) the extent to which the district commission is able to draft proposed permit conditions addressing potential areas of concern; and

(5) the thoroughness with which the application has addressed each of the 10 criteria.

(B) Preliminary procedures. The district commission shall review each application to determine whether the project qualifies for treatment under this Rule. If the project is found to qualify under section (A), the district commission shall:

(1) prepare a proposed permit including appropriate conditions; and

(2) provide written notice and a copy of the proposed permit to those entitled to written notice under 10 V.S.A. § 6084; and

(Added, effective January 2, 1996.)

(3) provide published notice as required by 10 V.S.A. § 6084; the notice shall state that:

(a) the district commission intends to issue a permit without convening a public hearing unless a request for hearing is received by a date specified in the notice which is not less than seven days from the date of publication; and

(b) the preparation of findings of fact and conclusions of law by the district commission may be waived; and

(c) statutory parties, adjoiners, potential parties under Rule 14(B) and the district commission, on its own motion, may request a hearing;

(d) any hearing request shall state the criteria or subcriteria at issue, why a hearing is required and what evidence will be presented at the hearing; and

(e) any hearing request by a non-statutory party must include a petition for party status under the rules of the board. (Subsections (c), (d), and (e) added, effective January 2, 1996.)

(C) No hearing requested. If no hearing is requested by a statutory party, adjoining property owner or potential party under Rule 14(B), or by the district commission on its own motion, the proposed permit may be issued with any necessary modifications. The district commission may delegate the authority to sign minor permits which have been approved by the district commission to the district coordinator or the assistant district coordinator; (Amended, effective May 4, 1990 and January 2, 1996.)

(D) Hearing requested. Upon receipt of a request for a hearing, the district commission shall determine whether or not substantive issues have been raised under the criteria and shall convene a hearing if it determines that substantive issues have been raised. If the district commission determines that substantive issues have not been raised, the district commission may proceed to issue a decision without convening a hearing. (Added, effective January 2, 1996.)

If a hearing is convened, it shall be limited to those criteria or sub-criteria identified by a statutory party, successful petitioner for party status, or by the district commission unless the district commission, at its discretion, determines before or during the hearing, that additional criteria or subcriteria should be addressed. (Amended, effective January 2, 1996.)

(E) Party status petitions. The district commission shall rule on all party status petitions prior to or at the outset of the hearing. (Added, effective January 2, 1996.)

(F) The district commission need only prepare findings of fact and conclusions of law on those criteria or sub-criteria at issue during the hearing. However, findings of fact and conclusions of law may be issued with a decision to address issues identified and resolved during the minor application process, even if no hearing is held. (Amended, effective January 2, 1996.)

(G) Material representations. Upon issuance of a land use permit under minor application procedures, the permit application

and material representations relied on during the review and issuance of a district commission decision shall provide the basis for determining future substantial and material changes to the approved project and for initiating enforcement actions. (Added, effective January 2, 1996.)

Effective May 5, 1992

Rule 60. Qualified Purchasers of Lots in a Subdivision Created Without the Benefit of a Land Use Permit as Required by 10 V.S.A. Chapter 151

(A) Purpose. The purpose of this rule is to create a procedure for providing relief to the qualified purchaser of a lot or lots within a subdivision created without a Land Use Permit required by 10 V.S.A. Chapter 151. This rule provides for a modified application and review procedure by which a qualified purchaser, or a group of qualified purchasers, of one or more lots in a subdivision created without the required Act 250 review may apply for and shall obtain a Land Use Permit. A lot or lots eligible for review under this procedure must have been sold and conveyed to the qualified purchaser or purchasers prior to January 1, 1991 without the required Land Use Permit.

(B) Requirements. The requirements under 10 V.S.A. Chapter 151 may be modified to the minimum extent necessary to issue permits to qualified purchasers seeking relief. A complete application addressing all ten criteria of 10 V.S.A. § 6086(a) shall be filed by the qualified purchaser or purchasers seeking relief. Affidavits may be used to establish compliance for

existing septic systems, water supplies, and other improvements, as determined by the district commission or board. As in other Act 250 proceedings, district commissions and the board may place certain conditions and restrictions in the Land Use Permits to ensure that the values sought to be protected under Act 250 will not be adversely affected. Permit decisions will be based upon consideration of the requirements of the criteria of 10 V.S.A. § 6086(a)(1)-(10), as well as existing improvements, facts, and circumstances of each case.

In order to provide for an efficient review process and to reduce the expense for applicants, the board and the district commissions may require the consolidation of individual applications from any given subdivision. At least two weeks prior to the processing of an application under this rule, the district coordinator shall send notice to all potential applicants in the subdivision with a response period of not less than two weeks. The notice shall include the names and addresses of all lot owners within the subdivision. The lot owner(s) initiating the request shall provide a list of all other lot owners in the subdivision. Lot owners who are not qualified purchasers may join the application but they will not receive the benefit of modified standards under the criteria and will not be entitled by right to a permit under 10 V.S.A. §6025(c). (Amended, effective January 2, 1996.)

(C) Jurisdictional Opinion. Prior to submission of an application, a qualified purchaser must obtain a jurisdictional

opinion from the appropriate district coordinator in order to determine if the subdivided lot in question is subject to Act 250 jurisdiction. The potential applicant must provide the district coordinator with all relevant information including signed affidavits on forms prepared by the board. If the opinion concludes that Act 250 jurisdiction does exist and one or more qualified purchasers have been identified, pre-application assistance will then be provided by the district coordinator.

(D) Eligibility Requirements For Applicants. The purchaser must demonstrate eligibility for relief under 10 V.S.A. § 6025(c). A purchaser eligible for relief under this rule must have purchased the lot or lots and the deed or deeds must have been conveyed prior to January 1, 1991; must not have been involved in any way with the creation of the lot or lots; must not be a person who owned or controlled the land when it was divided or partitioned; and did not know or could not reasonably have known at the time of purchase that the transfer was subject to a permit requirement that had not been met. In making the determination whether the purchaser had knowledge of the illegality of the subdivision, the district coordinator will take into consideration any advisory opinions, declaratory rulings, or judicial determinations which conclude that the purchaser sold or offered for sale any interest in, or commenced construction on, any subdivision in the state without a required Land Use Permit. The board or the district commissions may decide the jurisdictional and purchaser eligibility questions if properly

raised during a public hearing on an application under this rule.

(E) Application Procedure

(1) For the sake of expedient review and an equitable sharing of costs associated with preparing application materials, all purchasers seeking relief within a subdivision may be required to become co-applicants by the district commission or the board.

(2) Pre-application assistance from the district coordinator will be available to all purchasers prior to the filing of an Act 250 application. The application must be submitted on forms supplied by the board and in accordance with Board Rule 10 except as modified herein. (Amended, effective January 2, 1996.)

(3) The district coordinator will review the application for completeness within five working days of receipt of the application. The applicant will be notified if there are deficiencies that need to be corrected. Once the application has been accepted by the district coordinator, procedural requirements for notice and hearings will be followed as set forth in 10 V.S.A. Chapter 151 and Board Rule.

APPENDIX A
Power and Communication Lines and Facilities: Permit Requirements

Effective June 16, 1971

Following the adoption of Appendix A of the rules and regulations of the environmental board (attached hereto), the Vermont general assembly placed the jurisdiction over construction of transmission lines with the public service board and distribution lines with the environmental board. When reading Rule A-3(a), references to "transmission" lines are to be considered applicable to distribution lines only.

A transmission facility for electricity requiring a certificate of public good is defined in public service board general order No. 51, dated October 27, 1972. The public service board shall rule on any issue of jurisdiction under general order No. 51.

Rules

RULE A-1. PURPOSE

To establish rules and procedures for applications for a permit under the land use and development act, 10 V.S.A. § 6001 by public and private utilities.

RULE A-2. DEFINITION

Power and communication lines and facilities, hereinafter "transmission facilities" or "facilities," shall mean any wire, conduit, and physical structure or equipment related thereto whether above, below, or on ground used for the purpose of carrying, transmitting, distributing, storing, or consuming of electricity or communications, but shall not include an electric generation or transmission facility which requires a certificate of public good under § 248 of Title 30. A transmission facility for electricity requiring a certificate of public good is defined in public service board general order No. 51, dated October 27, 1972. The public service board shall rule on any issue of jurisdiction under general order No. 51.

RULE A-3. SCOPE

(a) Permits required:

Unless specifically exempted under Rule A-3) no person shall, without having obtained a permit under 1[illegible] V.S.A. chapter 151, construct, relocate, reconstruct, or exten[illegible]ny transmission

facility for any purpose whether above, below, or on ground if the construction of improvements for the right-of-way involves more than one acre (for example, 2,200' long based on minimum width of 20' right-of-way) if within a municipality not having permanent zoning and subdivision ordinances or more than ten acres (for example, 22,000' long based on minimum width of 20' right-of-way) if a municipally owned utility. Reconstruction does not mean repair or replacement of component parts. For the purposes of this subsection if a transmission facility is constructed, relocated, reconstructed, or extended in segments and if at any time the total acreage of the improvements for the right-of-way of all segments completed within the preceding three (3) months together with any additional segment or segments to be constructed will equal or exceed the minimum acreage specified in this subsection, then a permit shall be required for the segment or segments of the facility which result in the acreage of the right-of-way to exceed such minimums.

(b) Exceptions:

(i) a generation or transmission facility which requires a certificate of public good under 30 V.S.A. chapter 5, § 248, is exempted under 10 V.S.A. § 6001(3), and no permit is, therefore, required.

(ii) in an emergency situation requiring immediate action, such as to protect the health or safety of the public, utility companies may take whatever steps without notice or hearing or a permit as may be necessary or appropriate to meet such an emergency on a temporary basis, but upon the cessation of said emergency, the provisions of these Rules and Regulations will apply. Any action taken under this subsection will be followed within 48 hours by written notice to the environmental board.

(iii) in situations requiring the temporary installation of transmission facilities, the utility companies may proceed with construction, relocation, reconstruction, or extension of transmission facilities without complying with the provisions of these Rules and Regulations after obtaining written approval from the applicable district environmental commission.

(c) Exemptions:

Subject to the provisions of Rule A-4 below the following transmission facilities shall be exempt from the permit requirements of the Rules and Regulations of the environmental board and this Appendix A:

(i) a transmission facility within a development or subdivision having a permit from a district environmental commission; or

(ii) an under or on ground transmission facility below the elevation of 2,500', reseeded and/or reforested provided it is

not located in a natural area, scenic area, or scenic corridor, as defined in 10 V.S.A. § 1309; or (iii) an under or on ground transmission facility within a right-of-way, including a public highway, existing, cleared, and in use, as of the effective date of these rules or having a permit under 10 V.S.A. chapter 151 provided that such installation will not require widening or changing the character of the existing right-of-way or as may be specified in a permit; or

(iv) an above ground transmission facility in a right-of-way existing, cleared, and in use, as of the effective date of these rules, excepting rights-of-way for public highways, where such installation does not require widening or changing of the character of the right-of-way; or

(v) an above ground transmission facility to be located on existing, and in use, transmission facilities.

(d) All utilities undertaking the development of a transmission facility considered exempt under subsection (c) above will notify in writing the district environmental commission in which the majority of the facility will lie of said development.

RULE A-4. INSTALLATIONS

(a) Underground installation should be installed whenever feasible.

(b) All utility companies should contact each other prior to underground installation in order to coordinate efforts.

(c) Installation shall be such as to make the facility inconspicuous and not have an undue adverse effect on the scenic and aesthetic qualities and character of the area; due consideration shall be given to screening from view and lines of sight from public highways, and residential and recreational areas; height, number, color, type, and material of poles, width and degree of clearance of natural growth and cover; encroachment on open spaces, historic sites, rare and irreplaceable natural areas, conspicuous natural out-cropping on hillsides and ridgelines of exposed natural features of the countryside.

RULE A-5. PERMIT APPLICATIONS

An application for a permit from the district environmental commission to construct, relocate, reconstruct, or extend any transmission facility shall contain the following information and documents and shall be submitted to the district commission in which the greatest number of miles of the transmission facility are located. The utility undertaking the construction of a transmission facility shall apply for the permit under 10 V.S.A. chapter 151, if said permit is required and will disclose anticipated use by other utilities.

(a) General location:

(i) approximate location on a 20' contour U.S.G.S. map, except when other contour intervals are requested by the district commission after filing of an application.

(b) Plan showing:

(i) pole, transformer, and substation locations, if applicable. Proof of inability to comply shall be furnished in the permit application and the approximate locations of poles, transformers, and substations shall be provided in areas where property access is not available.

(ii) approximate highway rights-of-way related to the lines or to the community the line is to serve.

(iii) approximate location of the forest canopy of any existing wooded areas, and the forest canopy after the proposed construction.

(iv) all lot lines intersecting the existing or proposed rights-of-way and names of property owners.

(c) Specifications:

(i) a drawing showing a representative profile of a supporting structure as related to existing buildings and tree heights.

(ii) elevation drawings of any building to be constructed as part of the transmission facility and its relation to existing man-made and natural objects on the site and along the periphery of contiguous properties within 500'. In urban areas with a population in excess of 2,500, a general profile of the buildings may replace the requirement for elevation drawings.

(iii) a typical drawing of a supporting structure to be used.

(iv) a list of specifications, including voltage, pole sizes, cross-arms, wire size, guys.

(v) a list of specifications for the major, visible components and exterior materials and color of any buildings.

(vi) specifications for any ground cover to be seeded, refoliated, planted or sown and maintained.

(d) Certification:

(i) certification and supporting evidence to prove that use of an existing right-of-way is not feasible or practicable if a new right-of-way is intended.

RULE A-6. CARE OF RIGHT-OF-WAY

Right-of-way improvements shall be specified in the application and shall clearly not have an undue adverse effect on the ecology and aesthetics of the area, and should include vegetation control techniques to avoid unreasonable soil erosion or water pollution. All herbicide applications shall be in strict conformance with the regulatory and licensing requirements of the commissioner of agriculture or as provided by statute.

RULE A-7. STRUCTURES.

Nothing herein shall be construed to exempt structures and other physical construction or placement related to transmission facilities from such other requirements of the land use and development act and the Rules and Regulations of the environmental board as may be applicable.

(March 11, 1997)
J:\DATA\SHARED\LAW_RULE\EBR\BDRULES.95

EXHIBIT D

Mailing address:
c/o State Office Building PO
Montpelier, Vermont 05602
NEW MAILING ADDRESS:
58 East State Street
Drawer 20
Montpelier, VT
05620-3201

Location:
58 East State Street
Montpelier, Vermont 05602

STATE OF VERMONT
ENVIRONMENTAL BOARD
MONTPELIER, VERMONT 05602
802-828-3309

DATE: January 23, 1996

TO: Senator Matt Krauss and Members of the Senate Natural Resources Committee

FROM: Michael Zahner, Director of Administration M.Z.

RE: S.329 -- Radio Waves

I. INTRODUCTION

S.329 proposes to remove all consideration of radio waves emanating from broadcasting towers as air pollution under Criterion 1 of Act 250. This memorandum considers whether radio frequency interference (RFI) or radio frequency radiation (RFR) is subject to Act 250 review and, if so, to what extent.

As explained below, Act 250 has no authority to regulate RFI caused by a project, and only has a limited role in mitigating RFR caused by a project otherwise subject to Act 250.

II. BOARD'S AUTHORITY UNDER ACT 250

The Legislature accorded the Environmental Board the status of an independent regulatory body with supervisory powers over environmental matters. Pursuant to 10 V.S.A. § 6086(c), the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the Act 250 criteria. The Board is not bound by the Agency of Natural Resources' determinations with regard to matters that are subject to concurrent jurisdiction.[1] However, where federal law is concerned, the Board can only exercise its authority where it has not been preempted by federal legislation or regulation.

III. FEDERAL COMMUNICATIONS ACT

Act 250 jurisdiction over projects which result in RFI or RFR cannot be determined without first considering the Federal Communications Act (FCA) and the authority accorded by the FCA to the Federal Communications Commission (FCC).

The FCA creates a system of "dual jurisdiction" whereby the FCC and the states exercise jurisdiction over certain aspects of the broadcasting and telecommunications industries. Inevitably, the "realities of technology and economics" make impossible a "clean parcelling of responsibility"

individual states.[2] Ultimately, a court of law is the final arbiter of the constitutional "turf wars" spawned by the dual jurisdiction system. Courts resolve the turf wars between the FCC and the states by resort to the doctrine of preemption.

The Vermont Supreme Court recently issued a decision which examines the issue of preemption. The Court's decision arose out of an appeal by Stokes Communications, Inc. from an Environmental Board decision requiring the installation of light shields on a 303-foot communications tower. The Court ruled that "state law is pre-empted to the extent that it actually conflicts with federal law, but there is no actual conflict where a collision between two regulatory schemes is not inevitable."[3] FCC permission to operate a radio station or cellular telephone system does not preempt otherwise applicable state laws. States' rights survive, even if under the FCC's watchful eye.

The FCC's policy is to determine whether preemption is necessary and, if so, to what extent. In a proceeding involving preemption of local zoning control over satellite "dish" antennas, the FCC acknowledged the "strong local interest in zoning regulation," and made clear that it did not "wish to assume the position of a national zoning board or substitute its judgment for that of local authorities by reviewing a myriad of individual zoning decisions."[4] After careful review, the FCC concluded that zoning ordinances were impeding dish antenna installation and that guidelines were warranted to address the problem. In contrast, over the past five years, thirty-two Act 250 permits were issued for broadcast and communication towers, and their respective equipment. Clearly, Act 250 has not impeded the construction of broadcast and cellular telephone systems.[5]

III. RFI AND RFR

There is no dispute that, with regard to RFI, there is "an irreconcilable conflict" between the FCC's exclusive jurisdiction over RFI and Act 250.[6] Quite simply, RFI falls within the FCC's technical domain and neither Act 250 nor local zoning ordinances can regulate RFI.

However, with regard to RFR, the FCC itself recognizes that "[a]lthough the FCC would not knowingly authorize a facility or device that resulted in a health hazard, the FCC's primary jurisdiction does not lie in the health and safety area. Therefore, the FCC must rely on other agencies and organizations for guidance in these matters."[7]

The FCC first began its inquiry into potential RFR hazards in a 1979 Notice of Inquiry. The Notice of Inquiry eventually resulted in the FCC's adoption of rules in 1985. The FCC adopted as its processing guideline for determining the significance of human exposure to RFR the "Radio Frequency Protection Guides" promulgated in 1982 by the American National Standards Institute

(ANSI). In adopting the ANSI 1982 standard, the FCC explicitly rejected calls for blanket preemption in the RFR area.[8] Thus, Act 250 has a role when it comes to RFR under Criterion 1, even if decidedly narrow.

IV. ACT 250'S LIMITED ROLE

The FCC's regulation of RFR is codified at 47 C.F.R. Part One, Section §1.1301-1319. The RFR regulations grant a categorical exclusion from review of those activities which will comply with the ANSI 1982 standard. The issuance of a FCC license for these activities is proof that the licensee will not violate the ANSI 1982 standard. For example, cellular telephone systems are categorically excluded from detailed review.

For those FCC activities not categorically excluded, the regulations require the preparation of a Draft Environmental Impact Statement and Final Environmental Impact Statement, internal review by the FCC, an opportunity for public comment, and the opportunity for an applicant to amend its application to lessen the project's environmental impact. An applicant can exceed the ANSI 1982 standards and still be issued a license provided the FCC determines that the project will not have a significant impact.[9]

The FCC's approach to RFR review is based on the policy that larger, more powerful, or more accessible RFR sources be evaluated for their potential to cause excessive and possibly hazardous exposures, but that the very large number of relatively low-powered, inaccessible, or intermittent sources be categorically excluded from evaluation, unless required otherwise by the FCC.[10] Act 250's limited role is directly related to the FCC's review of RFR.

For categorically excluded activities, an applicant would merely present its FCC license to satisfy Criterion 1 with regard to RFR. Thus, Criterion 1 is essentially a non-issue for categorically excluded activities.

For activities not categorically excluded, an applicant would have to demonstrate how it could avoid causing undue air pollution while exceeding the 1982 ANSI standard. In all likelihood, an applicant could meet this burden by simply restricting access to the project. As the FCC stated, "[i]t should be emphasized that *accessibility* is a key factor in determining compliance with an exposure standard. Compliance can often be realized by appropriate restrictions on accessibility to the environment surrounding an RF transmitting source."[11] Simply put, a fence or signs warning people of the potential hazard may be all that is required under Criterion 1.

Finally, due to the preemption doctrine, it is unclear

air pollution caused by RFR if the FCC has otherwise approved the project pursuant to 47 C.F.R. §1.1301-1319. For example, the District #7 Environmental Commission issued a permit to Atlantic Cellular Co., L.P. notwithstanding that the 1982 ANSI standard was exceeded by the project. The District Commission stated:

> While the Commission recognizes the existence of, and adherence to, FCC licensing protocols regarding RFR emissions, the Commission, in looking at the cumulative impact of RFR emission levels at the site, and (sic) is presently concerned that a health hazard may exist in specific locations. In order to ascertain that public health, safety, and welfare are being served, more information needs to be collected, and made available to the Commission. The Commission may be required to impose appropriate conditions to assure safe, continued use of the site for recreational and communications purposes.[12]

The District Commission's review is consistent with the FCC's policy that local and state authorities share a role in ensuring a community's health, safety and welfare. The District Commission competently understood the issues and was able to formulate a reasonable remedy that protects Vermont's environment while also facilitating cellular service. The Legislature should not deny local review in those rare instances where a licensee may not comply with the ANSI 1982 standard, especially when the FCC has expressly declined to preempt local and state review.

V. CONGRESSIONAL AND LEGISLATIVE DEVELOPMENTS

Both Congress and the FCC are currently revisiting the issues discussed in this memorandum. Congress is considering a major overhaul of the FCA, and the FCC has two pending petitions for rulemaking regarding general preemption and RFR preemption.

VI. SUMMARY

In summary, there is no authority for Act 250 review of a project's RFI under Criterion 1. RFI is a technical matter solely within the FCC's purview. With regard to RFR, while the FCC has regulated in this area, it has intentionally chosen to not preempt state and local review. Since Act 250 has not, nor will it, impede interstate telecommunications and broadcasting, there is no justification to deny local review in those rare instances where a licensee may not comply with the ANSI 1982 standard.

FOOTNOTES

1. In re Stokes Communications Corporation, 6 Vt. Law Week 210, 212; In re Hawk Mountain Corp., 149 Vt. 179, 185 (1988); In re Denio, 158 Vt. 230, 239 (1992); In re Quechee Lakes Corp., 154 Vt. 543, 550 n.4 (1990).

2. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 360 (1986).

3. In re Stokes Communications Corporation, 6 Vt. Law Week 210, 212 (1995). The Court went onto rule that because Stokes failed to show an inevitable collision between the Board's order and the authority of the Federal Aviation Administration over light shields on towers, there was no preemption and the Board's order was valid.

4. In the Matter of Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 100 F.C.C. 2d 846, 852, CC Docket No. 85-87, Notice of Proposed Rulemaking. Ultimately, the FCC promulgated the rule that state and local zoning regulations which differentiate between satellite dishes and other types of antennas are preempted unless such regulations (i) have a reasonable and clearly defined health, safety, or aesthetic objection; and (ii) do not operate to impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas or to impose on the users of such antennas costs that are excessive in light of the purchase and installation cost of the equipment. See 47 C.F.R. Part 25, §25.104.

5. For example, see the attached Atlantic Cellular Company coverage map.

6. Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997 (6th Cir. 1994).

7. Questions and Answers about Biological effects and potential Hazards of Radiofrequency Radiation, Federal Communications Commission, OET Bulletin No. 56, Third Edition, January 1989, at p. 14.

8. 50 Fed.Reg. 11157 (March 20, 1985). The FCC stated: "We continue to be aware that, largely due to the lack of a federal standard, various state and local jurisdictions around the country either have adopted or have proposed standards for exposure of the general public to RF radiation. The issue of federal preemption of such local and state RF standards was a recurring theme in many of the comments. Several of the respondents stressed the need for a federal radiation standard to preempt possibly

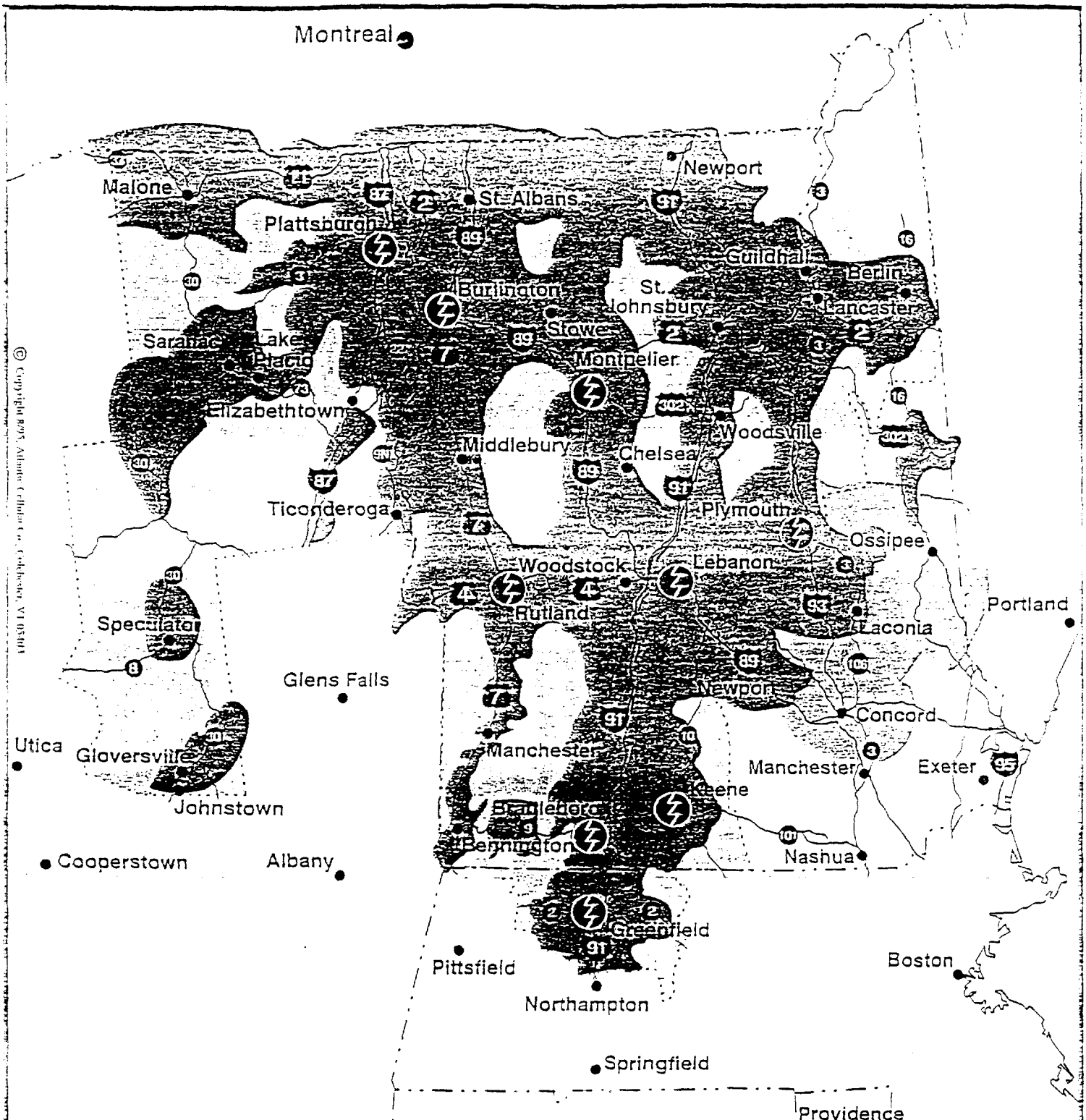
radiation. Others called for the issuance of a [FCC] policy statement on federal preemption of state and local RF exposure standards that may adversely affect operations and public availability in interstate telecommunications services. We have reviewed these comments closely and given the matter serious consideration. However, we do not believe it is necessary at this time to resolve the issue of federal preemption of state and local RF radiation standards. Should non-federal RF radiation standards be adopted, adversely affecting a licensee's ability to engage in [FCC] authorized activities, the [FCC] will not hesitate to consider [preemption] at that time."

9. 47 C.F.R. § 1.1308.

10. 52 Fed.Reg. 13241 (April 22, 1987).

11. 50 Fed.Reg. 11158 (March 20, 1985). Emphasis in original. With specific regard to radiation emitted by radio and television broadcasting antennas, FCC OET Bulletin No. 56 stated, in part: "Public access to broadcasting antennas is normally restricted so that individuals cannot be exposed to high-level fields that might exist near an antenna. Measurements made by EPA and others have shown that RF radiation levels in inhabited areas near broadcasting facilities are generally well below levels believed to be hazardous. There have been a few situations around the country where exposure levels have been found to be higher than those recommended by applicable safety standards. But such cases are relatively rare, and few members of the general public are likely to be routinely exposed to excessive levels of RF radiation from broadcast towers. In unusual cases where exposure levels pose a problem, there are various steps a broadcast station can take to ensure compliance with safety standards. For example, high-intensity areas could be posted and access to them could be restricted by fencing or other appropriate means. In some cases more drastic measures might have to be considered, such as redesigning an antenna, reducing power, or station relocation."

12. Re: Atlantic Cellular Co., L.P., #7C0467-5, Findings of Fact, Conclusions of Law, and Order at 4 (June 19, 1995).



CellularOne Licensed Territory

Home Rate Coverage

Reduced Roaming Rate Coverage

Roaming Rate Coverage

Roaming coverage depicted is in counties where cellular service is provided by other cellular providers and other CellularOne carriers. THE ENTIRE AREA MAY NOT BE COVERED.

Cost of roaming coverage is lower than seasonal average

CellularOne Sales & Service Centers
1-800-676-CELL-1

NOTE: As with all radio transmission, actual coverage may vary due to atmospheric conditions, terrain, or customer equipment.

Vermont Coverage Map

CELLULARONE®
AtlanticCellular Company

GUIDE TO SCHEDULE B FOR COMMUNICATIONS FACILITY

INTRODUCTION:

All development applications, including those for towers and other communications facilities, are required by 10 V.S.A. §6001 to address the ten criteria of Act 250. This guide is intended to help you frame responses under the criteria.

Although towers themselves are a significant factor, roads, power lines, sheds, buildings, fences, and other equipment may also be part of the project. All features of the project must be addressed. In addition to the physical improvements and infrastructure, there are three project phases to be considered: the construction phase, the use after construction, and the reclamation or removal when the project is no longer being operated or used.

I. THE APPLICATION FORM:

The application form must be completely filled out. This two-page form is the request for a permit - everything else is supporting documentation. All landowners, tenants, and other holders of an interest in the tract or tracts must sign the application even if the communications facility is leased on a portion of a large tract. All easements, rights-of-way, and other encumbrances to the land should be described.

The project description should include all construction and all changes for which approval is required. The description is used to create a legal notice for the public.

II. THE SITE PLAN AND PROJECT DRAWINGS

Site plans should show the communications facility and all associated construction in sufficient detail to understand the project. All natural and cultural features near or impacted by the project should be shown, including septic systems, wells, streams and other bodies of water, wetlands, forests, roads, easements, buildings, etc.

Drawings should be prepared that show how the project will look, including towers, antennas, guy wires, sheds, support pads, vegetation and/or landmarks.

A USGS map or similar map is also required so that reviewers can identify the project location. This map can also be used to indicate communication coverage or service area.

Please call the district coordinator if you have any questions about what to include on the site plan and drawings.

III. SCHEDULE B

The short form schedule B is a fill-in-the-blanks form that can be used for all types of projects by addressing the relevant questions. Given the Commission's legal obligation to make positive findings, all ten criteria are relevant and should be addressed. The following is an advisory guide based on common issues that normally arise under the ten criteria. There may be other issues depending on the circumstances associated with your particular project and site.

1 AIR POLLUTION

- Describe all emissions, odors, and sources of noise.
- Describe all measures, devices, procedures that will reduce emission, noise, odor.
- Does the project meet FCC regulations including radio frequency radiation (RFR) standards? Please provide documentation.
- Address control of dust and other particulate matter.

1 (A) HEADWATERS

- Generally not applicable.

1 (B) WASTE DISPOSAL

- Generally not applicable.

1 (C) WATER CONSERVATION

- Generally not applicable.

1 (D) FLOODWAYS

- Generally not applicable.

NOTE: If your project involves these criteria, you must address them. Call coordinator if in doubt.

1 (E) STREAMS

- If there are seasonal or year-round streams near the project or access road, mark these on the site plan.
- Include naturally vegetated, undisturbed buffer strips to protect streams. A state fisheries biologist can help you determine the size and nature of buffers.

1 (F) SHORELINES

- Identify shorelines of rivers, ponds, or lakes on or adjoining the tract(s).
- Describe potential effect on shorelines and bodies of water; contact representatives of the Agency of Natural Resources if there is a chance that shorelines will be affected.
- Address buffers if there are shorelines.

1 (G) WETLANDS

- Approximate boundaries of nearby wetlands should be marked on the site plan.
- Contact a state wetlands biologist if there are wetlands on the tract.
- Describe potential impacts to wetlands from construction and use of the project.
- Address buffers if there are wetlands.

2 & 3 WATER SUPPLIES

- Generally not applicable.

4 EROSION

- Describe the area proposed for development and how vulnerable it is to potential erosion problems.
- Consider the construction or improvements to roads and power line corridors along with the telecommunications equipment, then describe proposed temporary and permanent erosion control measures.
- On a site plan show details and locations for all erosion control measures.
- Describe plans for monitoring and repairing erosion control devices.
- Address grading, seeding, and mulching. Include procedures, monitoring, and scheduling.

5 TRAFFIC

- What road leads to the project? Describe existing safety conditions of the road serving the project.
- What are the sight distances at the proposed entrance to the project? Does anything need to be done to make the sight distances adequate?
- Will the project require a town or state access permit?
- Describe traffic associated with the construction and operation of the project (construction, operation, maintenance).

6 EDUCATIONAL SERVICES

- Generally not applicable.

7 MUNICIPAL SERVICES

- Explain how the project will not create an unreasonable burden on fire, ambulance, police, highway, solid waste, and other services provided by local municipalities.

- Will emergency service providers be able to readily locate the site and get to it if necessary?
- Describe the physical security of the site, including fences, gates, anti-climbing devices, and alarms.

8 AESTHETICS

In many cases, this is the Act 250 criterion needing particular attention for communications applications. Perform a visual impact assessment (VIA) of all parts of the project, including roads, utility lines, cleared land, towers and other structures. The VIA may need to be only a few pages with drawings or it could be fairly extensive, depending on the nature of the project. In any case, it should address at least the following:

- Describe the visual appearance of the project site as it exists without the project. How exposed is the area?
- Submit drawings of all structures and proposed equipment.
- How much land will be cleared?
- Describe mass, height, signs, lights, colors, materials and all other visual aspects of the project.
- Are lights shielded?
- Can existing roads or trails be used for access?
- Can the power lines be laid on the ground, buried, or strung through the trees?
- Describe any proposed plantings.
- Consider using a USGS map to mark the areas that will have views of the project (a viewshed map).
- Is the project in an area above 2,500 feet, located in a designated scenic corridor, or in a public recreation area, or can it be seen from such areas?
- Describe the visual appearance of the site with the project. Use a photograph montage or other techniques to show how structures will appear to viewers from adjacent roads, houses, rivers, and other notable areas.
- Have there been local permit reviews or comments from applicable state agencies?
- Will the project be removed when it is no longer needed?
- Will the project allow for additional facilities, co-location and other measures that reduce multiple visual impacts?
- What agreements or terms are used to determine what can be installed on any tower?
- Would balloons or other demonstration methods help to show the potential tower location and appearance? Discuss the feasibility of models or demonstrations, or pictorial representations.
- Will the project affect historic sites, archaeologically sensitive areas, rare or irreplaceable areas?
- After you have assembled the facts for the VIA, consider using the two-part